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**REQUIEM FOR LAQUAN MCDONALD:**

**POLICING AS PUNISHMENT AND ABOLISHING  
REASONABLE SUSPICION**

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*To have lived in bad faith is to have evaded recognition of oneself as a human being. It is to have lived a fugitive existence. . . . To die in bad faith, then, is tantamount to having never lived.<sup>1</sup>*

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INTRODUCTION

The socio-legal landscape of punishment is vast. While actions in courts during sentencing and in prisons and jails afterward are necessary considerations when thinking about punishment, an expansive examination of the institution of punishment encompasses more.<sup>2</sup> To sufficiently interrogate punishment, we must also scrutinize policing, not as a precursor to punishment but rather as its opening moment.<sup>3</sup> Given the fatal consequences of some opening moments,<sup>4</sup> as

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1. LEWIS R. GORDON, *BAD FAITH AND ANTI-BLACK RACISM* 183 (1999).

2. To understand how most examinations of punishment limit themselves to sentencing, prisons, and jails reforms, one need look no further than the vast number of criminal law journal articles that limit their coverage of punishment to the success or failure of criminological theories. An excellent example can be found in Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 *BRIT. J. AM. LEGAL STUD.* 263 (2013). Materni astutely quotes Justice Antonin Scalia during oral arguments in *Miller v. Alabama*: “Well, I thought that modern penology has abandoned that rehabilitation thing, and they—they no longer call prisons reformatories or—or whatever, and punishment is the—is the criterion now. Deserved punishment for crime.” *Id.* at 264 (referencing *Miller v. Alabama*, 132 S.Ct. 2455 (2012)).

3. See generally Steve Martinot & Jared Sexton, *The Avant-Garde of White Supremacy*, 9 *SOC. IDENTITIES* 169 (2003).

4. To capture the disturbing statistics related to fatal consequences of encounters with the police, see Janice Williams, *Police Shooting Statistics 2016: Are More Black People Killed by Police*

well as the reality that policing inaugurates a process of incapacitation and abuse in which individuals are frequently unable to defend themselves due to a lack of economic, political, and legal capital,<sup>5</sup> any true analysis of punishment must first grapple with policing—if it is to stand as an *ethical* analysis, that is.

Customarily “ethics” refers to a set of moral choices evaluated as either right or wrong;<sup>6</sup> we, however, use “ethical” as Frank Wilderson does, as a sober and accurate assessment of the power relations in a given situation.<sup>7</sup> To talk about and to practice law in this context without addressing the real power relations at play is to pretend as if policing represents the rule of law, rather than a regime of force at odds with legal principles of due process, privacy, and fairness. This, in essence, would be to flee from a displeasing reality in favor of a more comforting falsehood. Since we are uninterested in the evasive comforts of such legal untruths, we seek to deal with the world as it is, not as the prevailing legal discourse would purport it to be.<sup>8</sup> We argue that when applied within the real-world context of policing, the legal fiction of “reasonable suspicion” is

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*Officers than Other Races?*, INT’L BUS. TIMES (Sept. 25, 2016, 3:42 PM), <http://www.ibtimes.com/police-shooting-statistics-2016-are-more-black-people-killed-officers-other-races-2421634> [<http://perma.cc/Z2H7-MAUS>]. According to Williams, “[o]f the 990 people who were killed by police officers in 2015, the Washington Post reported 258 of them were black. So far in 2016, there have been 708 documented deaths in police shootings, 173 of which have resulted [in] the deaths of African-Americans.” *Id.* Williams’s article was written in the aftermath of the shooting death of Keith Lamont Scott in Charlotte, North Carolina. *See Protests Break out After Man Killed in Officer-Involved Shooting in Charlotte*, WCCB CHARLOTTE (Sept. 21, 2016), <http://www.wccbcharlotte.com/2016/09/21/suspect-dead-officer-involved-shooting-university-area/> [<http://perma.cc/3Z8R-5NVG>].

5. *See* *Bad Elk v. United States*, 177 U.S. 529, 534 (1900) (recognizing the right to self-defense in cases involving unlawful arrests by a police officer). The right to self-defense included the right to use force to thwart the police action. *Id.* Many jurisdictions no longer consider *Bad Elk* good law. *See* Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 953 (2011). Most states have, either by statute or by case law, removed the unlawful arrest defense for resisting arrest. *Id.* The states that still recognize the defense are Alabama, Georgia, Louisiana, Maryland, Michigan, Mississippi, New Mexico, New York, North Carolina, Pennsylvania, South Carolina, Virginia, West Virginia, and Wyoming. *Id.* at 953 n.124.

6. According to the Internet Encyclopedia of Philosophy, a peer-reviewed academic resource, “ethics” is also known as “moral philosophy” and is defined as “involv[ing] systematizing, defending, and recommending concepts of right and wrong behavior.” James Fieser, *Ethics*, INTERNET ENCYCLOPEDIA PHILOSOPHY, <http://www.iep.utm.edu/ethics/> (last visited May 5, 2017) [<http://perma.cc/H9CQ-QXLB>].

7. *See* FRANK B. WILDERSON, III, *RED, WHITE, AND BLACK: CINEMA AND THE STRUCTURE OF U.S. ANTAGONISMS* 2–5 (2010).

8. The prevailing discourse around due process, privacy, and fairness is encapsulated in the language of Thomas Jefferson in the Declaration of Independence in 1776 at the beginning of the American Revolution. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The often quoted language reads,

We hold these truths to be self-evident: that all men are created equal ; that they are endowed, by their Creator, with certain unalienable rights ; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

*Id.* This language serves as a foundation for how we think about such legal concepts of fairness, due process, and equality under the law.

intrinsically and irreparably antiblack, perhaps even racist, and hence fundamentally unconstitutional. The fiction of reasonable suspicion; its legal counterpart, stop and frisk;<sup>9</sup> and the case from which they arise, *Terry v. Ohio*,<sup>10</sup> should not only be discredited and disavowed but also should be overturned and declared unconstitutional. This outcome would not only be ethical, either premised on moral interpretations of right and wrong or reconciliation with the sobering truths of antiblack legalisms, but more importantly, it would significantly recalibrate the relations of force such that policing would remain within more appropriately defined confines of the Constitution.

Thus, an ethical starting point for any discussion of rethinking punishment begins with the indisputable reality that black people, particularly when envisioned as criminal suspects, are punished through policing not for what they may have done, but rather for who they are and where they are situated in society's racial hierarchy.<sup>11</sup> Not only does the criminal justice system target and process a small fraction of law breaking,<sup>12</sup> moreover, it focuses its energy on those crimes that are the *least* consequential to society in terms of monetary loss, property damage, environmental destruction, community harm, personal injury, and loss of life. This structural dispensation highlights the behaviors of the least powerful (black people) and obscures, minimizes, or negates the harmful conduct of the most powerful (militarized police agencies).<sup>13</sup> This plays out in certain arenas of legal discourse (such as "tough on crime")<sup>14</sup> that are specifically

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9. We argue that the fiction of reasonable suspicion gives rise to the fiction that stop and frisk is actually real—real in the sense that the practice is consistently carried out in a legal manner. But in practice, black men are not simply stopped and frisked; they are harassed, berated, abused, and in some instances even killed. Thus, stop and frisk is at least as much a fiction as reasonable suspicion—a fiction that begets a greater fiction.

10. 392 U.S. 1 (1968). *Terry* is the landmark Supreme Court decision, which held that the Fourth Amendment prohibition against unreasonable searches and seizures is not violated when a police officer stops a suspect on the street and frisks him or her without probable cause, as long as the officer has reasonable suspicion that the person is committing, has committed, or is about to commit a crime and has a reasonable belief that the person "may be armed and presently dangerous." *Id.* at 30.

11. See W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 9 (4th ed. 1904) (1903). In his famed work, DuBois explains that "[t]he problem of the twentieth century is the problem of the color-line." *Id.* at 13. He opens his book by explaining the struggle of being black (or the other) and responding to an often unasked question, "how does it feel to be a problem," by stating that he rarely answers it, or he "answer[s] seldom a word." *Id.* at 1–2.

12. STEVEN BOX, *POWER, CRIME, AND MYSTIFICATION* 5–6 (1983).

13. See RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* 334–35 (2013). While Balko's book explains the history of aggressive policing in America, the American Civil Liberties Union (ACLU) Report, *War Comes Home*, does a better job of demonstrating the connection of the American War on Terror to the increased number of police departments utilizing military tactics and weapons. See AM. CIVIL LIBERTIES UNION, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING* 17–18 (2014); see also MICHELLE ALEXANDER, *THE NEW JIM CROW* 73–77 (2010).

14. See Inamai Chettiar, "Tough on Crime" No Longer the American Mantra?, HUFFINGTON POST (May 2, 2012, 4:02 PM), [http://www.huffingtonpost.com/inimai-chettiar/tough-on-crime-no-longer-\\_b\\_1468835.html](http://www.huffingtonpost.com/inimai-chettiar/tough-on-crime-no-longer-_b_1468835.html) [<http://perma.cc/P6AR-YBAR>]. The history of the "tough on crime" mantra emanates from the 1988 George Bush v. Michael Dukakis presidential race. In that race, the Bush campaign described Dukakis, who offered a political platform that supported increased spending on

oriented towards poor black people and other minorities and is largely taken for granted. One of the main obstacles to adequately assessing the power relations of domination and control, especially when they express themselves as punishment, hides in the often overlooked (and incorrectly understood) mechanisms by which the law vests power in the police. Thus, to more fully rethink punishment, we must reconsider the relationship between law and legal practice, or the law as written versus the law in action.<sup>15</sup>

In this Article, we offer the reader two routes, described below, to explore our critiques of the policing paradigm (which hides racial punishment within the dark mass of law), and we evaluate how we reach our conclusion regarding delegitimizing the legal fiction of reasonable suspicion. The first route mobilizes the law against itself; it demonstrates how reasonable suspicion in practice violates *Terry's* own standards. This argument is brief, however, because mobilizing the law against itself requires accepting certain mythologies about the law, such as the law being fair and just. Although mythological upkeep is ubiquitous within the legal academy, to acquiesce in legal scholarship would be to join everyone else in intellectually treading water. Instead, we seek a deeper dive, out where sharks protect the watery graves of the millions of Africans who perished in the Middle Passage. Particularly in current times, we recognize that there is danger in such a sojourn but believe the truth cannot be revealed if we refuse to attempt the journey. As Lewis Gordon claims in our epigraph, “[t]o die in bad faith, then, is tantamount to having never lived.”<sup>16</sup>

The second route of our argument recognizes that to live in good faith is to actively work against living in bad faith. We argue that accepting legal principles at face value is bad faith, for it is only with the law in action that we can establish the ethical standing to adjudicate whether the suspicions deemed “reasonable” are just that. By using both routes, we indict reasonable suspicion as the means through which contemporary U.S. society has extended the terms of its slaveholding and Jim Crow past—not by refashioning Jim Crow as the leading cause of mass incarceration, as others have argued,<sup>17</sup> but instead by holding on to the principles of pro-slavery and reconstructionist antiblack legal agendas.<sup>18</sup>

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health care, child care, education, and housing, as an “ineffective liberal.” *1988 Bush vs. Dukakis*, LIVING ROOM CANDIDATE, <http://www.livingroomcandidate.org/commercials/1988/willie-horton> (last visited May 5, 2017) [<http://perma.cc/B2BM-R9V8>]. The Bush campaign used a series of brutal television advertising to portray Dukakis as someone who would “gut the country’s defense system and let convicted murderers out of prison.” *See id.* “Hoping voters would dismiss the attacks as unfair, Dukakis refused to counterattack until late in the campaign.” *Id.*

15. Law in action is a legal theory attributed to the legal realism movement, which examines the role of law as it operates in society. Kenneth B. Davis, *Law in Action: The Dean’s View*, U. WIS. L. SCH., <http://law.wisc.edu/law-in-action/davislawinactionessay.html> (last visited May 5, 2017) [<http://perma.cc/844Z-XUUD>]. Law in action is popularized by the creed of the University of Wisconsin’s legal scholarship and teaching. *See id.*

16. GORDON, *supra* note 1, at 183.

17. *See, e.g.,* ALEXANDER, *supra* note 13, at 1–3.

18. Pro-slavery and reconstructionist antiblack agendas can be located in the rule of law, namely the legislation, legal rulings, and customary practices that pitted blackness against white supremacy ideology. *See generally* William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 *CHI-*

In other words, the legal ruling in *Terry* should be seen as the segregationist case for a pro-slavery legal agenda in the post-Civil Rights era in the same way *Plessy v. Ferguson*<sup>19</sup> was the segregationist case for it in the post-emancipation period.

### I. THE PROBLEM OF GENERALIZED SUSPICION

To begin our interrogation, we state emphatically that the concept of reasonable suspicion, as articulated in *Terry*, is a legal fiction,<sup>20</sup> a prophylactic rule, and a judicial construct. Nowhere in the language of the Constitution do the combinations of words, “reasonable suspicion,” “limited intrusion,” “petty indignity,” “pat down,” or “stop-and-frisk,” appear,<sup>21</sup> although they have all been used by the Court since the late 1960s to justify its Fourth Amendment jurisprudence in *Terry* and its progeny.

When the Framers drafted the Fourth Amendment, they recognized the problem of discretionary government authority.<sup>22</sup> Thus it not only captured the colonists’ resistance to general warrants and writs of assistance, but also their implicit objection to *gratuitous violence*, which continues to mark the policing of black people today—the imposition of authority and punishment arbitrarily and without specific cause.<sup>23</sup>

By *gratuitous violence*, we mean the violence that happens not because of some transgression, such as breaking the law, but instead as punishment for simply existing—such as driving or walking “while black” as the contemporary

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KENT L. REV. 1051 (1993) (providing an overview of slavery laws as they related to the black image and justification for slavery). Examples include, but are not limited to, slave codes, black codes, antimiscegenation laws, and the infamous Supreme Court doctrine enunciated in *Dred Scott v. Sanford*, 60 U.S. 393 (1857), and *Plessy v. Ferguson*, 163 U.S. 537 (1896). An often quoted statement in *Dred Scott* states:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.

*Dred Scott*, 60 U.S. at 407.

19. 163 U.S. 537 (1896). *Plessy* is the landmark Supreme Court decision, which upheld racial segregation laws and instituted the “separate but equal” doctrine in American society. *Id.* at 544.

20. See RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 202 (3d ed. 2012) (providing a definition of legal fictions as “an assumption that conceals, or affects to conceal, the fact that a rule of law has been altered . . . it is a supposition or postulation that something is true regardless of whether or not it is”).

21. U.S. CONST. amend. IV. The exact language of the Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.*

22. See Mike Maharrey, *Fourth Amendment: The History Behind “Unreasonable”*, TENTH AMEND. CTR. (Sep. 25, 2014), <http://tenthamendmentcenter.com/2014/09/25/fourth-amendment-history-behind-unreasonable/> [http://perma.cc/LQV7-3S4Q].

23. See *id.* (providing an excellent, but brief, history of the Fourth Amendment).

saying goes.<sup>24</sup> Gratuitous violence is what happens when “generalized suspicion” is the lens through which people are viewed. In Andrew Taslitz’s book, *Reconstructing the Fourth Amendment: A History of Search and Seizure*, an account that is faithful to the hegemonic narrative of the Fourth Amendment, “general searches were implicitly seen as insulting because they violated principles of individualized justice.”<sup>25</sup> The so-called principle of individualized justice is culturally and historically specific to Western slaveholding culture. It was important to the colonists precisely because as slave owners they knew better than anyone the power signified by gratuitous violence. The prohibition against arbitrariness was vital to the colonists and serves as a cornerstone of criminal justice reform today because it disavows the ability of those in power to target people because of their group-based identity—an unfortunate practice that spills from those in power into society as a whole. One example is the outcome in *Floyd v. City of New York*<sup>26</sup> regarding the New York Police Department’s (NYPD) stop-and-frisk practices. Judge Shira Scheindlin held that “reasonable suspicion requires an *individualized* suspicion of wrongdoing,” and an officer “must be able to articulate something more than an inchoate and unparticularized suspicion or hunch.”<sup>27</sup> Similarly, the colonists’ objection to the use of the general warrant resonates across contemporary Fourth Amendment jurisprudence: “A police department may not target a racially defined group for stops *in general*—that is, for stops based on suspicions of general criminal wrongdoing—simply because members of that group appear frequently in the police department’s suspect data.”<sup>28</sup>

Although reasonable suspicion is meant to operate at an individual level, as we are reminded by Judge Scheindlin, it fails this intended goal.<sup>29</sup> The practice of suspicion itself is conceptually wedded to the social and political constructions of blackness—it inherently applies to an entire population.<sup>30</sup> The language of suspicion, or those words that give rise to it, such as “danger,” “threat,” and “security,” are racialized concepts that define black people as intrinsically suspicious *as a group*, irrespective of individual behaviors. Therefore, individual-level suspicion is limited: it only attends to white behaviors, and even then, police officers are loath to make the connection. In other words, only white people are arrested for what they do, not for who they are. Judge Scheindlin’s opinion in *Floyd* included testimony that officers were instructed: “This is about

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24. See, e.g., David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999).

25. ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868*, at 41 (2006).

26. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

27. *Floyd*, 959 F. Supp. 2d at 568, 567 (second internal quotation marks omitted); see also *Alabama v. White*, 496 U.S. 325, 329 (1990).

28. *Floyd*, 959 F. Supp. 2d at 563.

29. *Id.* at 667.

30. TRYON P. WOODS, *BLACKHOOD AGAINST THE POLICE POWER: PUNISHMENT AND DISAVOWAL IN THE “POST-RACIAL” ERA* (forthcoming).

stopping the right people, the right place, the right location.”<sup>31</sup> Although not explicitly stated, this paradigm for “stopping the right people” presupposes there is a “right people” versus a “wrong people.”<sup>32</sup> Without more substantive analysis, this allows officers to use bias to determine the right person to stop (black) and the wrong person to stop (white). Again, with the latter, police officers are loathe to make the connection.

New York Senator Eric Adams captured this analysis when he stated that Ray Kelly, the police commissioner at the time of *Floyd*, told him that “he wanted to instill fear in [young black and Latino] men that every time they left their homes they could be stopped by police.”<sup>33</sup> When it was pointed out to the commissioner that this type of group-based suspicion was illegal he allegedly replied: “How else are we going to get rid of guns?”<sup>34</sup> Needless to say, policing based on reasonable suspicion did not help get rid of guns: no weapons were found “in 98.5% of the 2.3 million frisks” conducted after 4.4 million stops between 2004 and 2012 in New York City.<sup>35</sup>

These statistics bear out across contexts and categories of law breaking: time and again, studies verify that reasonable suspicion, particularly when it involves racial profiling, simply *masks* criminal behavior because it shields white people, who are more likely to be involved in criminal behavior, from scrutiny.<sup>36</sup> It is notoriously ineffective as a basis of crime control—but then, that has been precisely the point of antiblack policing: social control, *not* crime control.<sup>37</sup> The *Floyd* case occurred after an earlier case, *Daniels v. City of New York*, failed to produce changes in police stop-and-frisk practices in New York City.<sup>38</sup> In the period between the city’s settlement of *Daniels* in 2003<sup>39</sup> and the *Floyd* decision in 2013, the NYPD actually *increased* its stop-and-frisks dramatically, “from

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31. *Floyd*, 959 F. Supp. 2d at 604; see also Jennifer Gonnerman, *Officer Serrano’s Hidden Camera: The Stop-and-Frisk Trials of Pedro Serrano: NYPD Rat, NYPD Hero*, N.Y. MAG. (May 19, 2013) <http://nymag.com/news/features/pedro-serrano-2013-5/> [<http://perma.cc/JLY6-WSCM>].

32. *Floyd*, 959 F. Supp. 2d at 602–06.

33. Kristen Gwynne, *Sen. Eric Adams: NYPD Commissioner Told Me Cops Use Stop-and-Frisk to Instill Fear in Youths of Color*, ALTERNET (Apr. 1, 2013), <http://www.alternet.org/sen-eric-adams-nypd-commissioner-told-me-cops-use-stop-and-frisk-instill-fear-youths-color> [<http://perma.cc/C77E-697J>].

34. Shanikka, *When a Judge ‘Gets It’ on Racism: The Decision in Floyd v. City of New York*, DAILY KOS (Aug. 18, 2013, 8:00 PM), <http://www.dailykos.com/story/2013/8/18/1231661/-When-a-judge-gets-it-on-racism-The-decision-in-Floyd-v-City-of-New-York> [<http://perma.cc/8ZK6-ZRBE>].

35. *Floyd*, 959 F. Supp. 2d. at 573.

36. See DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 73–91 (2002); KRISTIAN WILLIAMS, *OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA* 131–43 (3d ed. 2015).

37. See HARRIS, *supra* note 36, at 80; WILLIAMS, *supra* note 36, at 142 (“Racial profiling is not about crime at all; it’s about controlling people of color.”).

38. *Daniels, et al. v. the City of New York, CTR. FOR CONST. RTS.*, <http://cjrjustice.org/home/what-we-do/our-cases/daniels-et-al-v-city-new-york> (last modified Oct. 1, 2012) [<http://perma.cc/5W9E-WDCC>].

39. *Id.*

314,000 [stops] in 2004 to a high of 686,000 in 2011.”<sup>40</sup> It is therefore socially impossible for suspicion to *not* be generalized and unparticularized, making it intrinsically *unreasonable*. Put differently, reasonable suspicion is inherently racist. It should be recognized as unconstitutional and unlawful.

## II. DECONSTRUCTING THE PROPHYLACTIC RULE IN *TERRY V. OHIO*

Reasonable suspicion is a judicial construct and a prophylactic rule; it can be stretched, changed, and if necessary, obliterated. As such, we argue that the prophylactic status of reasonable suspicion is an additional way of mobilizing the law against itself. By definition, legal rules that are judicially crafted, rather than set forth in the Constitution, are considered “prophylactic rules” because they are designed to give more protection to a constitutional right than necessary on its face.<sup>41</sup> As is the case with any legal fiction and judicial construct, however, the utility of prophylactic rules can cut both ways: while some see such rules as working to safeguard a constitutional right or improve the ability to detect constitutional violations, others argue that they defy the intent of the Framers.<sup>42</sup> Nonetheless, their malleable nature make prophylactic rules especially vulnerable to the imposition of the Court’s general philosophy at a given time. When it comes to reasonable suspicion and stop-and-frisk, this problem is readily apparent. Yet, this problem offers us the opening we need to turn reasonable suspicion against itself and rethink punishment to end stop-and-frisk.

In *Terry*, where the Court created the prophylactic standard of reasonable suspicion, the Court tried to clarify what exactly makes a suspicion reasonable and required that it be based on objective “articulable facts.”<sup>43</sup> We argue, however, that the government articulated no such facts. At trial, Detective Martin McFadden offered his extensive experience as a police officer as the basis for his suspicion of John Terry and Richard Chilton.<sup>44</sup> His acumen, McFadden told the court, alerted him that Terry and Chilton were “casing a job” for a “stick-up.”<sup>45</sup> On cross-examination, however, McFadden conceded that in his thirty-nine years on the police force, thirty-five as a detective, he had never observed a suspect “casing a place” for a stick-up; he had never arrested anyone for casing or robbing a store.<sup>46</sup> Moreover, McFadden admitted that Terry and Chilton did not run away from the store but rather walked away normally<sup>47</sup>—in

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40. *Floyd*, 959 F. Supp. 2d. at 573, 609.

41. Evan H. Camiker, *Miranda and Some Puzzles of “Prophylactic” Rules*, 70 U. CIN. L. REV. 1, 1–2 (2001).

42. Justice Clarence Thomas and the late Justice Antonin Scalia have argued against prophylactic rules, writing that the ability of judges to create these rules “is an immense and frightening antidemocratic power, and it does not exist.” *Dickerson v. United States*, 530 U.S. 428, 446 (2000) (Scalia, J., dissenting).

43. *Terry v. Ohio*, 392 U.S. 1, 10, 21 (1967).

44. *Id.* at 5.

45. *Id.* at 6.

46. Transcript of Oral Argument, *Terry v. Ohio*, 392 U.S. 1 (1967) (No. 67); Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN’S L. REV. 727, 730 (1998).

47. Transcript of Oral Argument, *supra* note 46.

other words, they were not “act[ing] suspicious or anything.”<sup>48</sup> When pressed further as to why he was suspicious of Terry and Chilton, McFadden testified that a witness described them to him as “two negroes,”<sup>49</sup> and he said, “Well to tell the truth, I didn’t like them. And I was attracted to their actions up there on Fourteenth Street.”<sup>50</sup>

This counternarrative within *Terry*’s own record contradicts the Court’s proclamation that McFadden’s suspicions were reasonable based on his experience and objective articulable facts—especially since the Court omits the one fact most pertinent in this (and every) policing scenario: Terry and Chilton’s blackness. What the Court found “reasonable” in McFadden’s actions is nothing more than classic Negrophobia, the sexualized neurosis of white supremacy, a disavowed desire for and fear of black bodies.<sup>51</sup> In other words, *Terry*, the case that created the prophylactic reasonable suspicion rule, a new standard to conduct a lesser form of search and seizure without probable cause or a warrant,<sup>52</sup> began as a case of racial profiling. Thus, by extension, reasonable suspicion developed as a standard equivalent to the general writ so loathed by the colonists and Framers of the Fourth Amendment.<sup>53</sup> Although the *Terry* Court apparently thought it was interpreting the law to conform with a prevailing police practice, which itself is problematic, it instead constitutionally enshrined the generalized suspicion that has been placed upon black people for hundreds of years. While hegemonic legal discourse holds that law is created, police enforce it, and courts interpret it, here we see things actually happen in reverse: policing *precedes* law, shapes its interpretation, and then receives validation from the Court.<sup>54</sup> Thus, when you unpack how reasonable suspicion works, to whom it applies, and why it occurs, and consider those factors alongside its inability to produce positive policing outcomes proportionate to its usage, you can conclude that it is a failed legal paradigm for constitutional policing. Since it is a prophylactic rule, it can easily be abolished as a constitutional rule and practice.

### III. RETHINKING PUNISHMENT’S FOUNDATION

Rethinking punishment—which is to say, rethinking *black* punishment—requires going beyond certain mythologies about the law. If we start from the world as it is, not as we wish it to be, then we begin with the premise that the Constitution itself is founded in racist violence.<sup>55</sup> The principles of the highest

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48. Stokes, *supra* note 46, at 730.

49. *Id.* at 729.

50. Transcript of Oral Argument, *supra* note 46; *see also* Stokes, *supra* note 46, at 729.

51. *See* FRANTZ FANON, BLACK SKIN, WHITE MASKS 124–32 (Charles Lam Markmann trans., Grove Press 1967) (1952).

52. *Terry*, 392 U.S. at 27; *id.* at 37 (Douglas, J., dissenting).

53. *See supra* notes 22–25 and accompanying text.

54. WOODS, *supra* note 30.

55. *See* Dorothy E. Roberts, *The Meaning of Blacks’ Fidelity to the Constitution*, 65 FORDHAM L. REV. 1761, 1764–65 (1997) (discussing historical provisions of the Constitution and racist

law of the land are not neutral with respect to the war against Africans.<sup>56</sup> At the very least, an ethical approach to rethinking punishment would not take these legal principles at face value but instead would focus on what the law does in action. From this vantage, we see that policing often does not follow the Constitution; instead, it follows the political forces at play in any given historical moment.<sup>57</sup> The political forces determining policing today are commensurate with the sexual violence of slavery and its afterlife, presenting us with another necessary inversion: the protection against wanton punishment (Fourth Amendment) is in practice a reflection of the slaveholder's desire to act wantonly towards blacks, the license to search and seize black people at will.

The Fourth Amendment in practice repudiates the hegemonic narrative about search and seizure, which proclaims that it is a reply to the tyranny of generalized suspicion and invasive state power that is typical of colonial and undemocratic regimes.<sup>58</sup> This historical account and the legal analyses resting upon it are faithful to the colonists' words but blind to their deeds. The colonists famously presented their cause as revolutionary because it sought to throw off the shackles of enslavement under the British Crown,<sup>59</sup> when in fact, their resistance was counterrevolutionary in that it endeavored to keep the shackles on the Africans.<sup>60</sup> They condemned the writs of assistance as "instruments of slavery" and proclaimed themselves ready to die rather than submit to British enslavement.<sup>61</sup> Historian Gerald Horne argues that the American Revolution is properly understood as a counterrevolution of slavery.<sup>62</sup> The colonists' rebellion against Britain came as London was moving towards a revolutionary abolition of slave trading, leaving the United States to become the undisputed captain of the

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interpretations).

56. See, e.g., U.S. CONST. art. 1, § 2, cl. 3 (Three-Fifths Clause); U.S. CONST. art. IV, § 2, cl. 3 (Fugitive Slave Clause).

57. An excellent example would be the series of law enforcement Executive Orders signed by President Donald J. Trump, on February 9, 2017, one of which aligns with the anti-Black Lives Matter rhetoric from police officers that "Blue Lives Matter." Exec. Order No. 13,774, 82 Fed. Reg. 10,695 (Feb. 14, 2017). The specific Executive Order known as *Preventing Violence Against Federal, State, Tribal, and Local Law Enforcement Officers*, calls upon the Justice Department to create new crimes for attacking or assaulting police officers, despite the overwhelming evidence that the police have killed hundreds of unarmed black men within the past year. *Id.* at sec. 1; see also *Police Violence Map, MAPPING POLICE VIOLENCE*, <http://mappingpoliceviolence.org/> (last visited May 5, 2017) [<http://perma.cc/4W46-KMM6>].

58. See *supra* note 28 and accompanying text. The Fourth Amendment acts as a reply to the tyranny of generalized suspicion by requiring certain that standards (namely the probable cause and warrant requirement) be met before searches and seizures can constitutionally occur. However, reasonable suspicion and stop and frisk have come to trump those standards that the Framers intended to act as a protection for the colonists and as a check on governmental power.

59. See generally THOMAS JEFFERSON & JOHN DICKINSON, *DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS* (1775).

60. See U.S. CONST. art. IV, § 2, cl. 3 (Fugitive Slave Clause).

61. TASLITZ, *supra* note 25, at 39.

62. See generally GERALD HORNE, *THE COUNTER-REVOLUTION OF 1776: SLAVE RESISTANCE AND THE ORIGINS OF THE UNITED STATES OF AMERICA* (2014).

transatlantic and Pan-American slave trade.<sup>63</sup> Thus, in the creation of the Constitution, enshrining the necessity of individualized suspicion and protecting against generalized suspicion was nothing less than an assertion of white prerogative to punish black people; or, stated differently, the right to generalize the suspicion of blacks is seemingly central to the stability and security of the white nation and was treated as such by our country's founders.

To recognize this foundational violence in contemporary cases, one must focus on the law in practice, more so than on abstract legal principles. In *Ware v. City of Detroit*, Detroit police had frisked Elvis Ware, an Army veteran and black man, during what seemed to be a routine *Terry* stop.<sup>64</sup> After forcibly removing Ware from the stationary vehicle in which he was seated, Officer Michael Parish handcuffed him and proceeded with an intrusive search.<sup>65</sup> He reached into Ware's pants and "squeezed his genitals and then attempted to stick a finger up Mr. Ware's anus."<sup>66</sup> Next, Ware alleges that he was handcuffed and forced to sit in a police cruiser while the officers removed his boots and searched his car and trunk.<sup>67</sup> After the search revealed nothing, Parish allegedly informed Ware that he was going to "cut [him] a break" and released him.<sup>68</sup> The ACLU settled the case in 2009 on the day trial was set to begin.<sup>69</sup> This is how the routine practice of reasonable suspicion and stop-and-frisk enacts the terror of sexual violence associated with slavery and its aftermath.

Sexual violence attributed to reasonable suspicion was also evident in the 2009 case, *Denson v. United States*,<sup>70</sup> in which customs agents detained a pregnant black woman under suspicion of drug trafficking upon her return to the United States from Jamaica.<sup>71</sup> In *Denson*, not only did the court implicitly condone the use of race, gender, and nation as the basis for reasonable suspicion, but it also held that the forced removal of Denson to a local hospital for a pelvic exam, forced body cavity search, forced laxative treatment, and handcuffed detention until the laxative cleared out her bowels were not unreasonable under the Fourth Amendment.<sup>72</sup> In a classic demonstration of how white psychic fantasies become material realities,<sup>73</sup> the suspicions of law enforcement were

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63. *Id.*

64. *Army Veteran Subjected to Intrusive Body Search by Detroit Police Settles Case*, AM. CIV. LIBERTIES UNION OF MICH. (Jan. 22, 2009), <http://www.aclumich.org/article/army-veteran-subjected-intrusive-body-search-detroit-police-settles-case> [<http://perma.cc/SHD7-FZJ4>].

65. *Id.*

66. *Id.*

67. Complaint and Jury Demand at 6–7, *Ware v. City of Detroit*, No. 2:07-cv-11339 (E.D. Mich. Mar. 28, 2007).

68. *Id.* at 7 (alteration in original).

69. *Army Veteran Subjected to Intrusive Body Search by Detroit Police Settles Case*, *supra* note 64.

70. 574 F.3d 1318 (11th Cir. 2009).

71. *Denson*, 574 F.3d at 1323–24, 1342 n.63.

72. *Id.* at 1327–28, 1343–44.

73. An example of white psychic fantasies becoming material realities is today's white fantasy about recalcitrant black criminality tomorrow becoming a three-strikes law that removes felons permanently from society.

proven baseless at each step in Denson's torture-detention, and yet, the police and the court translated the absence of drugs into confirmation that they must have been hidden.<sup>74</sup> The mythic specter of black criminality—especially in the form of a black female sexuality—outweighed the endangerment of Denson's unborn child and her constitutional protections under the Fourth, Fifth, and Fourteenth Amendments. Additionally, because of its mythic quality, sexual racism proves most persuasive precisely when it fails to predict a perceived reality. In *Denson*, the legal transposition of what we would call rape as “reasonable suspicion” or “security interest” veils this violence with the implication of collusion—and of course, positing black agency as criminality masks state terror.<sup>75</sup>

#### IV. THE LAW IN ACTION: A REQUIEM FOR LAQUAN McDONALD

Since we know that reasonable suspicion, in practice, leads to sexual and racial terror, we must focus on obliterating its constitutional existence. If the Court were to deem reasonable suspicion unconstitutional, it would advance a process of depolicing the police: incrementally ratcheting down the level of impunity that the police enjoy today. The case of Laquan McDonald, the seventeen-year-old African American teen fatally shot sixteen times by a Chicago police officer,<sup>76</sup> provides fertile soil to plant our argument against the continued use of reasonable suspicion as a policing paradigm. But McDonald's treatment by the police and untimely death does not stand in isolation. The number of cases that illustrate the terror of policing is a litany and a liturgy, and no single case can stand for the whole of the problem as different variations with alarming similarities rotate through the news cycle.<sup>77</sup> Nonetheless, we say McDonald's name in this Article out of respect for all in his position and to remember him and others as we attempt to speak for the whole.

McDonald was shot and killed on October 20, 2014 by Chicago Police Department (CPD) Officer Jason Van Dyke.<sup>78</sup> Responding to a call for backup, Van Dyke stepped out of his police cruiser, and prosecutors allege that seconds later, he fired sixteen shots.<sup>79</sup> In a publicly-released police video of the incident, it appears that McDonald was shot several times after he had fallen to the ground,<sup>80</sup> where he posed no threat to the safety of the officers. The entire

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74. See *Denson*, 574 F.3d at 1343–44.

75. See generally *id.*; WOODS, *supra* note 30.

76. Josh Sanburn, *Chicago Releases Video of Laquan McDonald Shooting*, TIME, (Nov. 24, 2015), <http://time.com/4126670/chicago-releases-video-of-laquan-mcdonald-shooting/> [<http://perma.cc/Y52X-PT6L>].

77. See, e.g., GREG THOMAS, *THE SEXUAL DEMON OF COLONIAL POWER: PAN-AFRICAN EMBODIMENT AND EROTIC SCHEMES OF EMPIRE* (2007).

78. Sanburn, *supra* note 76.

79. Jeremy Gerner et al., *Top Police Brass Defended Laquan McDonald Shooting After Seeing Video, Records Show*, CHI. TRIB. (Dec. 23, 2016, 6:55 AM), <http://www.chicagotribune.com/news/laquanmcdonald/ct-laquan-mcdonald-shooting-inspector-general-report-met-20161222-story.html> [<http://perma.cc/6FTT-77W2>].

80. Sanburn, *supra* note 76.

encounter was captured on police dashboard cameras without audio, raising questions as to “whether officers were careless with the recording equipment or, worse, attempting a cover-up.”<sup>81</sup>

Since there was no audio, the images of the video were left open to interpretation.<sup>82</sup> And in the aftermath, the CPD rehearsed a familiar script. CPD seemingly sought to absolve its officers of any accountability for McDonald’s death by claiming that the victim threatened officers’ lives, forcing them to employ lethal force.<sup>83</sup> CPD asserted that McDonald posed a legal threat to the safety of the officers despite his incapacitation by Van Dyke’s first bullet(s).<sup>84</sup> CPD stated that McDonald “refused to comply with orders to drop the knife and continued to approach the officers.”<sup>85</sup> This narrative inverted culpability to sustain police impunity. It also set the stage for the police officers involved to give factually inaccurate explanations of what happened. According to a detective’s account of his interview with Van Dyke:

McDonald was holding the knife in his right hand, in an underhand grip with the blade pointed forward. He was swinging the knife in an aggressive, exaggerated manner. . . .

[He] ordered McDonald to ‘Drop the knife!’ multiple times. McDonald ignored [his] verbal direction to drop the knife and continued to advance toward [him]. When McDonald got to within 10 to 15 feet of [him], McDonald looked toward [him].

McDonald raised the knife across his chest and over his shoulder, pointing the knife at [him]. [He] believed McDonald was attacking [him] with the knife, and attempting to kill [him]. In defense of his life, [he] backpedaled and fired his handgun at McDonald, to stop the attack. . . .

. . . .

. . . McDonald fell to the ground but continued to move and continued to grasp the knife, refusing to let go of it. [He] continued to fire his weapon at McDonald, as McDonald was on the ground, as McDonald appeared to be attempting to get up, all the while continuing to point the knife at [him].<sup>86</sup>

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81. *Lack of Sound in Laquan McDonald Shooting Videos ‘Raises a Red Flag’*, CHI. TRIB. (Dec. 3, 2015, 12:17 PM), <http://www.chicagotribune.com/news/local/breaking/ct-laquan-mcdonald-shooting-video-sound-20151203-story.html> [<http://perma.cc/NB25-4JEF>].

82. *See id.*

83. Gorner et al., *supra* note 79.

84. *Id.*

85. Mark Berman, *Why Did Authorities Say Laquan McDonald Lunged at Chicago Police Officers?*, WASH. POST (Nov. 25, 2015), [http://www.washingtonpost.com/news/postnation/wp/2015/11/25/why-did-authorities-say-laquanmcdonaldlungedatchicagopoliceofficers/?utm\\_term=.8e5c60a7ddd8](http://www.washingtonpost.com/news/postnation/wp/2015/11/25/why-did-authorities-say-laquanmcdonaldlungedatchicagopoliceofficers/?utm_term=.8e5c60a7ddd8) [<http://perma.cc/QL6K-74F4>] (quoting statement released by the CPD).

86. Wayne Drash, *The Killing of Laquan McDonald: The Dashcam Video vs. Police Accounts*, CNN (Dec. 19, 2015, 12:32 AM), <http://www.cnn.com/2015/12/17/us/laquan-mcdonald-video-records-comparison/> [<http://perma.cc/NH56-MQPC>] (internal quotation marks omitted). For a summary of how CPD attempted to minimize culpability for McDonald’s shooting, see Curtis Black, *How Chicago Tried to Cover Up a Police Execution*, CHI. REP. (Nov. 24, 2015), <http://chicagoreporter.com/how->

The other officers on the scene repeated the same false account.<sup>87</sup> This familiar narrative has been the staple explanation for police shootings—from at least the 1991 beating of Rodney King in Los Angeles, California, after which a jury accepted the officers' claim that King posed a threat despite that he was lying prone on the ground being relentlessly pummeled by four officers<sup>88</sup> to the 2014 murder of Michael Brown in Ferguson, Missouri, in which the grand jury accepted Officer Darren Wilson's claim that Brown was a larger-than-life demon who kept advancing on him even after Wilson had shot him repeatedly.<sup>89</sup> Of course, this narrative is effective because of the longstanding belief in U.S. society that black people are naturally violent and aggressive.<sup>90</sup> A deep-seated fear of black vengeance is intrinsic to a slaveholding society such as ours, and this collective fear of black savagery is the necessary justification for the wide ranging hostilities and abuses rained down on black people—from enslavement, to lynching, to the contemporary prison industrial complex.

The following excerpt from an editorial published in the *Wilmington Messenger* in 1898 demonstrates the unity between the discourse on lynching and today's prevailing police narratives:

Should a rattlesnake, or a mad dog, be tried before killing? Should a murderer, incendiary, or highwayman, caught in the act, be allowed to complete it and to appeal to all the delays and chances of law? If you, or your people, or your property, be feloniously attacked, will you await the laws, or will you act at once in self-defense? If a mad man be on the streets, marauding and slaying all he meets, must we take out a warrant for him, arrest and try him, before we disable him and stop his wild career? The negro who has just been lynched at Charlottesville was far worse than any rattlesnake or mad dog, far worse than any mad man or criminal and by his nature and course had outlawed himself utterly. To recognize in him any right to the protections and processes of law would be to mitigate his offence, aggravate the outrage upon the lady, and to add to the shame and horror already inflicted upon her.

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chicago-tried-to-cover-up-a-police-execution/ [http://perma.cc/9NT9-REZY].

87. See Annie Sweeney et al., *Top Cop Seeks to Fire 7 Officers for Lying About Laquan McDonald Shooting*, CHI. TRIB. (Aug. 18, 2016, 8:56 PM), <http://www.chicagotribune.com/news/laquanmcdonald/ct-laquan-mcdonald-police-punished-met-20160818-story.html> [http://perma.cc/4V38-LFWE].

88. Seth Mydans, *The Police Verdict; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES (Apr. 30, 1992), <http://www.nytimes.com/books/98/02/08/home/rodney-verdict.html> [http://perma.cc/56XW-QBF4].

89. See Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES, [http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?\\_r=0](http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0) [http://perma.cc/HL98-RK7A]. For the text of Darren Wilson's grand jury testimony, see Transcript of Grand Jury V at 224–36, *State of Missouri v. Darren Wilson* (Sept. 16, 2014), <http://www.documentcloud.org/documents/1370494-grand-jury-volume-5.html> [http://perma.cc/3RCU-MA4B].

90. See Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 404–05 (1996) (“The Black-as-criminal stereotype may cause people to perceive ambiguously hostile acts . . . as violent when a Black person engages in these acts and non-violent when a non-Black person engages in the same acts.”).

No decent white man endowed with reason and the proper respect of manhood, should or could restrain himself in the presence of so foul a crime. It would disgrace justice and defile the courts to treat him as an innocent man.<sup>91</sup>

As with the police power, it does not matter here whether a crime has been committed; the threat is self-evident in the nature of the alleged perpetrator, and threats are meant to be exterminated swiftly, preemptively, and without pause for due process of law.<sup>92</sup> The racism in this passage lies not simply in the idea that the Negro is an animal. “[I]t is foolish to put a snake on trial, not because he will have nothing to say in the witness box, but rather because he will bite you before you get him there.”<sup>93</sup> Put differently, the snake is barred from testimony not because he is an animal but because the possibility of his speaking is continually and permanently preempted by the threat he poses.<sup>94</sup> *This* is the racism: it matters not whether blackness signifies human or nonhuman status, but rather that the Negro will kill you if you waste time on the question in the first place.

From the standpoint of police power, blackness presumptively poses a danger to public welfare; acts of violence against black people are justifiable as self-defense, as obligatory to ensure the stability of society, and by these justifications, such acts can never be excessive.<sup>95</sup> In this paranoia of police power, black children are as feared as fully grown adults (Tamir Rice);<sup>96</sup> black men are convicted of rape on the basis of a white woman’s dream (Clarence Moses-EL);<sup>97</sup> black therapists aiding their autistic patients are shot for their trouble (Charles Kinsey);<sup>98</sup> black fathers are “stunned and arrested” while picking up their children from daycare (Chris Lollie);<sup>99</sup> black women are body-slammed to the ground for jaywalking (Ersula Ore);<sup>100</sup> black motorists seeking

91. See BRIAN WAGNER, *DISTURBING THE PEACE: BLACK CULTURE AND THE POLICE POWER AFTER SLAVERY* 19 (2009).

92. See *id.* at 19–20.

93. *Id.*

94. *Id.* at 20.

95. WOODS, *supra* note 30.

96. See Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GQ (July 14, 2016), <http://www.gq.com/story/tamir-rice-story> [<http://perma.cc/2GEA-8A6K>].

97. See Jordan Steffen, *Clarence Moses-EL Released After 28 Years in Prison*, DENVER POST, <http://www.denverpost.com/2015/12/22/clarence-moses-el-released-after-28-years-in-prison> (last updated Oct. 7, 2016, 5:46 AM) [<http://perma.cc/89LE-QNFA>].

98. See Charles Rabin, *Charles Kinsey Was Shot Less than Six Minutes After Police Arrived*, MIAMI HERALD (Aug. 5, 2016, 5:22 PM), <http://www.miamiherald.com/news/local/crime/article-94009242.html> [<http://perma.cc/REV2-9VCW>].

99. See Marino Eccher, *St. Paul Will Pay \$100,000 to Chris Lollie, Tased in Skyway Arrest*, TWIN CITIES, <http://www.twincities.com/2016/02/18/st-paul-will-pay-100000-to-chris-lollie-tased-in-skyway-arrest/> (last updated Feb. 18, 2016, 9:31 PM) [<http://perma.cc/YPY9-P6LY>]; Cireien Saadeh & Kristoffer Tigue, *St. Paul Man from Cellphone Arrest Video Identified; Police Dropped Charges in July*, TWIN CITIES DAILY PLANET (Aug. 28, 2014), <http://www.tcdailyplanet.net/st-paul-man-cellphone-assault-video-identified-claims-charges-dropped/> [<http://perma.cc/Q86F-WRLC>].

100. See Emma Lacey-Bordeaux, *Arizona Professor’s Jaywalking Arrest Quickly Gets out of Hand*, CNN, <http://www.cnn.com/2014/06/30/justice/arizona-jaywalking-arrest> (last updated June 30,

assistance (Renisha McBride, Jonathan Ferrell)<sup>101</sup> or lying unconscious in their cars until police break a window (Tyisha Miller)<sup>102</sup> are blown away by residents and police officers alike; holding a pellet gun for sale at Walmart becomes an executable offense if you are black (John Crawford);<sup>103</sup> sleeping on grandma's couch turns you into collateral damage during a police raid (Aiyana Stanley-Jones);<sup>104</sup> and heaven help you if you are black and are having a mental collapse (Quintonio LeGrier, Philip Coleman)<sup>105</sup> or happen to live next door to someone who is (Betty Jones).<sup>106</sup> In each of these scenarios and so many others, both state and society recognize (1) black people as danger personified, irrespective of their behavior; and (2) that policing relates to blackness as an exercise of power (violence with impunity), not as a practice (law enforcement), as an institution (the police), or as a principle (justice).<sup>107</sup> In other words, reasonable suspicion is the *a priori* condition under which all black people exist in this world; the threat of bodily harm or fatal injury is thus always imminent for black people.

Following a journalist's public records request and an intense legal effort by Chicago to suppress the evidence, Judge Franklin Valderrama ordered the dashcam video of McDonald's death released to the media.<sup>108</sup> The video affirmed that CPD and its officers lied about McDonald's shooting.<sup>109</sup> McDonald

2014, 12:29 PM) [http://perma.cc/LK3Y-L2V7].

101. See Alex Johnson, *Officer in Jonathan Ferrell Killing: 'He Kept Trying to Get My Gun'*, NBC NEWS (Aug. 13, 2015, 6:01 PM), <http://www.nbcnews.com/news/us-news/officer-jonathan-ferrell-killing-he-kept-trying-get-my-gun-n409491> [http://perma.cc/3UMP-8JJY]; Alana Semuels, *Detroit-Area Man Gets 17 to 32 Years for Shooting Visitor on Porch*, L.A. TIMES (Sept. 3, 2014, 4:38 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-porch-killer-sentenced-20140903-story.html> [http://perma.cc/T2WV-LKDQ].

102. See David Rosenzweig, *No Charges in Killing of Tyisha Miller*, L.A. TIMES (Dec. 13, 2002), <http://articles.latimes.com/2002/dec/13/local/me-tyisha13> [http://perma.cc/7QWB-KZMY].

103. See Elahe Izadi, *Ohio Wal-Mart Surveillance Video Shows Police Shooting and Killing John Crawford III*, WASH. POST (Sept. 25, 2014), [http://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-crawford-iii/?utm\\_term=.40c0a9579b51](http://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-crawford-iii/?utm_term=.40c0a9579b51) [http://perma.cc/RP95-CJQ8].

104. See Charlie Leduff, *What Killed Aiyana Stanley-Jones?*, MOTHER JONES (Dec. 2010), <http://www.motherjones.com/politics/2010/11/ayiana-stanley-jones-detroit> [http://perma.cc/693YM9DH].

105. See David A. Graham, *Why the Officer Who Killed Quintonio LeGrier Is Suing Him*, ATLANTIC (Feb. 8, 2016), <http://www.theatlantic.com/national/archive/2016/02/why-the-officer-who-killed-quintonio-legrier-is-suing-him/460443/>; Todd Lightly & Steve Mills, *Judge: Using Taser, Dragging Coleman from Lockup Amounts to 'Brute Force'*, CHI. TRIB. (Dec. 14, 2015, 4:05 PM) <http://www.chicagotribune.com/news/local/breaking/ct-philip-coleman-judge-ruling-met-20151214-story.html> [http://perma.cc/XBN8-W7UY].

106. Dawn Rhodes, *Friends, Family Say Goodbye to Woman Accidentally Killed by Chicago Police*, CHI. TRIB. (Jan. 6, 2016, 9:42 PM), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-shooting-funeral-bettie-jones-20160106-story.html> [http://perma.cc/PJ93-HFXU].

107. WOODS, *supra* note 30.

108. Carol Marin & Don Mosely, *Judge Orders Release of Video Showing Death of Chicago Teen*, NBC CHI., <http://www.nbcchicago.com/news/local/Judge-to-Decide-on-Release-of-Laquan-McDonald-Video-351741261.html> (last updated Dec. 17, 2015, 12:43 PM) [http://perma.cc/663Q-PLY].

109. See *Chicago Dashcam Video Shows Police Killing of Laquan McDonald – Video*,

made no movement toward any of the officers after Van Dyke fired the first shot, and yet Van Dyke continued to shoot bullets into McDonald while he was on the ground.<sup>110</sup> Van Dyke has been charged with first-degree murder, among other crimes.<sup>111</sup> In maintaining the official CPD narrative, particularly about McDonald posing an imminent threat immediately before Van Dyke shot him, other responding officers acted against their personal and professional interests by lying, thereby underscoring the deep and pervasive roots of police impunity and antiblack violence.<sup>112</sup> Recall that we are critiquing policing *as* the law in action, and because of the way the law in action works, the only higher authority to which victims can appeal, namely the courts, do not often enough find that the police violate the Fourth Amendment. Put simply, policing's impunity has already superseded its legal constraints.<sup>113</sup> This is what it means to exist under a regime in which policing precedes law and serves as the primary modality for punishment.

The release of the video infuriated a community already outraged not only by the numerous deaths not recorded on video, but also by the CPD's daily transgressions that prevent black people from exercising basic rights to move freely in their city.<sup>114</sup>

#### CONCLUSION

On January 13, 2017, the Department of Justice released the findings of its investigation into the CPD; the investigation had been launched immediately after the video evidence of McDonald's death became public.<sup>115</sup> The U.S. government found that the CPD routinely used "excessive force" and violated the basic constitutional rights of the city's black and Latino residents.<sup>116</sup> *The Washington Post* reported on a few of the long list of grim anecdotes detailed in the Justice Department's report:

Officers are described as running after people who they had no reason to believe committed serious crimes. Some of those chases ended in fatal gunfire. In one case, officers began chasing a man who was described as "fidgeting with his waistband." Police fired a total of 45

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GUARDIAN (Nov. 24, 2015, 7:52 PM), <http://www.theguardian.com/us-news/video/2015/nov/24/chicago-officials-release-video-showing-police-killing-of-laquan-mcdonald-video> [<http://perma.cc/629MQGCP>].

110. *Id.*

111. Steve Schmadeke, *Van Dyke Indicted on 16 Added Counts for Each Shot to Laquan McDonald*, CHI. TRIB. (March 23, 2017, 7:04 PM), <http://www.chicagotribune.com/news/local/breaking/ct-laquan-mcdonald-jason-van-dyke-court-met-story.html> [<http://perma.cc/72FT-4GBP>].

112. *See supra* notes 51–54 and accompanying text.

113. *See generally* Steve Martinot, *The Militarisation of the Police*, 9 SOC. IDENTITIES 205 (2003).

114. *See* Mark Berman & Matt Zaposky, *Chicago Police Officers Have Pattern of Using Excessive Force, Scathing Justice Dept. Report Says*, WASH. POST (Jan. 13, 2017), [http://www.washingtonpost.com/news/post-nation/wp/2017/01/13/justice-dept-to-announce-results-of-investigation-into-chicago-police/?utm\\_term=.def55703aa19](http://www.washingtonpost.com/news/post-nation/wp/2017/01/13/justice-dept-to-announce-results-of-investigation-into-chicago-police/?utm_term=.def55703aa19) [<http://perma.cc/TZ85-KQEJ>].

115. *Id.*

116. *Id.*

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rounds at him, hitting and killing him. No gun was found on the man, the report states, and a gun found almost a block away was both “fully-loaded and inoperable.”

These anecdotes were not limited to fatal incidents. A 16-year-old girl is described as being struck with a baton and shocked with a Taser for not leaving school when she was found carrying a cellphone. A 12-year-old Latino boy was “forcibly handcuffed” without explanation while riding his bike near his father.<sup>117</sup>

The report documented what residents already knew.<sup>118</sup> Unfortunately, it would be unprecedented if this exposé of how the law actually works in practice were to garner sustained attention, let alone sufficient remedy and redress. For our purposes, McDonald’s death focuses attention on what is at stake in the case against reasonable suspicion. The opening act of violence in police killings is always the visual performance of racial profiling.<sup>119</sup> We must strip reasonable suspicion from the state’s legal battery for justifying such violence and dismantle its constitutional grounding by, among many other things, first seeking a reversal of the ruling and legal mandates in *Terry*. Its reasonable suspicion rule is as dangerous and outdated in the post-Civil Rights era as *Plessy* became in the post-Emancipation era.

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117. *Id.*

118. *See id.* (“Distrust remains an issue between police officers and residents in Chicago. . . . [O]ne in three residents said the city’s police officers were doing an excellent or good job; far fewer black residents (12 percent) felt that way than [sic] white residents (47 percent) or Hispanic residents (37 percent).”).

119. WOODS, *supra* note 30.